KAREN P. HEWITT
United States Attorney
WILLIAM A. HALL, JR.
Assistant U.S. Attorney
California State Bar No. 253403
United States Attorney's Office
880 Front Street, Room 6293
San Diego, California 92101-8893
Telephone: (619) 557-7046/(619) 235-2757 (Fax)
Email: william.a.hall@usdoj.gov

Attorneys for Plaintiff
United States of America

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. TOMAS SANTILLANES-LOPEZ, Defendant(s).	Criminal Case No. 07CR3108-W DATE: April 1, 2008 TIME: 2:00 p.m. Before Honorable Thomas J. Whelan UNITED STATES' STATEMENT OF FACTS AND MEMORANDUM OF POINTS AND AUTHORITIES

I

STATEMENT OF THE CASE

The Defendant, Tomas Santillanes-Lopez (hereinafter "Defendant"), was charged by a grand jury on November 14, 2007 with violating 21 U.S.C. §§ 952 and 960, importation of cocaine, and 21 U.S.C. § 841(a)(1), possession of cocaine with the intent to distribute. Defendant was arraigned on the Indictment on November 20, 2007, and entered a plea of not guilty.

II

STATEMENT OF FACTS

Defendant was apprehended on the morning of November 4, 2007, by United States Customs and Border Protection ("CBP") Officers at the Calexico, California (West) Port of Entry. There, Defendant entered the vehicle inspection lanes as the driver and registered owner of a 1999

Nissan Sentra ("the vehicle"). He was accompanied by two passengers, Miranda Hernandez-Mendoza and her minor son.

At primary inspection, a CBP Officer asked Defendant where he was going. Defendant stated that he was traveling to Mecca, California. Defendant and the vehicle were then referred to the secondary lot for further inspection.

At secondary inspection, Defendant told a CBP Officer that he was only bringing an ice chest from Mexico. Defendant appeared nervous when answering questions, and his hands were shaking badly. The CBP Officer then requested a canine inspection from another CBP Officer, who utilized his Narcotics Detector Dog to screen the vehicle. The canine alerted to the presence of narcotics emanating from the vehicle. Upon further inspection of the vehicle, a total of 17 packages of a white powdery substance were recovered from the gas tank of the vehicle, weighing a total 19.00 kilograms, which later field-tested positive for the presence of cocaine. Defendant was arrested; Miranda Hernandez-Mendoza and her minor son were later released.

In a post-Miranda statement, Defendant admitted that he was paid $500.00 in advance for expenses while smuggling the narcotics into the United States. Defendant stated that this was the third time he had attempted to smuggle narcotics in the vehicle.

III

MEMORANDUM OF POINTS AND AUTHORITIES

A. THERE IS NO DUTY TO DISCLOSE EXCULPATORY EVIDENCE TO A GRAND JURY, AND THE INDICTMENT SHOULD NOT BE DISMISSED

Defendant argues that the Court should dismiss the Indictment on the ground that the previously-assigned Assistant U.S. Attorney was aware of material exculpatory evidence that was allegedly not presented to the indicting grand jury. This contention is meritless, as: (1) the United States has no constitutional obligation to present exculpatory evidence to a federal grand jury; and (2) Defendant's claims about the existence of exculpatory evidence are completely unsupported.

Defendant fails to even note the existence of the controlling U.S. Supreme Court case of United States v. Williams, 504 U.S. 36, 51-53 (1992), where the Court held that a federal prosecutor has no duty to present to the grand jury all matters bearing on the credibility of witnesses or any exculpatory evidence. 504 U.S. at 51-52. The continuing validity of Williams has been noted by the Ninth Circuit. See United States v. Navarro-Vargas, 408 F.3d 1184, 1189 n.7 (9th Cir. 2005) (en banc) (appeal from S.D. Cal.) ("The Court noted in Williams that although a rule requiring the prosecutor to disclose exculpatory evidence to the grand jury may save judicial time, the court 'need not pursue the matter ... [because] if there is an advantage to the proposal, Congress is free to prescribe it.'" (quoting Williams, 504 U.S. at 55)); United States v. Isgro, 974 F.2d 1091, 1096 (9th Cir. 1992) ("As in Williams, the defendants' constitutional argument in this case is that the grand jury was deprived of its ability to make an informed or independent decision by the prosecutor's failure to present exculpatory evidence. However, in fairly expansive language, Williams clearly rejects the idea that there exists a right to such 'fair' or 'objective' grand jury deliberations.").

Defendant makes the novel argument that pursuant to 28 U.S.C. §530B(a), Assistant U.S. Attorneys are required to present exculpatory evidence to federal grand juries pursuant to Cal. Pen. Code § 939.71(a). However, Defendant ignores the obvious fact that section 939.71(a)'s requirement applies to state grand juries, and state grand juries only. The criminal actions governed by the California Penal Code are those "prosecuted *in the name of the people of the State of California*, as a party . . ." Cal. Pen. Code § 684 (emphasis added). Grand juries regulated by the California Penal Code are those consisting of "the required number of persons returned from the *citizens of the county* before a court of competent jurisdiction, and sworn to inquire of public offenses *committed or triable within the county*." Cal. Pen. Code § 888 (emphasis added).

The United States does not dispute that if an Assistant U.S. Attorney found himself or herself for some reason presenting a case to a *state* grand jury, that prosecutor would have to follow the rules set forth in section § 939.71(a). However, the California Penal Code makes no claim to regulate federal practice in any way, shape, or form, and it suffices to say any attempt to do so would likely be struck down as violative of the Supremacy Clause in Article VI, Clause 2 of the United States Constitution. It should also be noted that the Ninth Circuit's decisions in Navarro-Vargas and Isgro sprung from appeals of California federal district court decisions, and in these cases the Ninth Circuit failed to find any requirement that a federal prosecutor disclose exculpatory evidence to a federal grand jury. See 403 F.3d 1184, 974 F.2d 1091.

Finally, although it is unnecessary for this Court to inquire into the alleged circumstances supporting his claims about the existence of exculpatory evidence, those claims are completely unsupported. Notably, under Ninth Circuit and Southern District precedent, as well as Southern District Local Criminal Rule 47.1(g)(1)-(4), a defendant is entitled to an evidentiary hearing on a motion only when the defendant adduces specific facts sufficient to require the granting of the defendant's motion. See United States v. Batiste, 868 F.2d 1089, 1093 (9th Cir. 1989) (where "defendant, in his motion to suppress, failed to dispute any material fact in the government's proffer, ... the district court was not required to hold an evidentiary hearing"); United States v. Moran-Garcia, 783 F. Supp. 1266, 1274 (S.D. Cal. 1991) (boilerplate motion containing indefinite and unsworn allegations was insufficient to require evidentiary hearing on defendant's motion to suppress statements); Crim. L.R. 47.1.

Defendant claims that in a prior 2002 drug smuggling case, charges were dismissed against him in the District of Arizona after passing a polygraph examination inquiring of his claims of duress. However, his argument in the instant case that any polygraph examination "confirmed the truth of his statements" is completely unsupported. As set forth immediately below, polygraph results are generally considered unreliable evidence and, thus, inadmissible in federal court. The basis for any decision made in 2002 by the United States Attorney's Office for the District of Arizona to dismiss charges against Defendant is simply not material or relevant to the instant case. One wonders what Defendant would argue if, instead, a polygraph examination allegedly confirmed his guilt, and the United States attempted to use that test against him.

Needless to say, Defendant has not come close to adducing specific facts sufficient to require the granting of his motion. Of course, under no factual scenario should his motion be granted, as the United States has no constitutional obligation to present exculpatory evidence to a federal grand jury.

B. DEFENDANT'S STATEMENTS SHOULD NOT BE SUPPRESSED

Defendant moves for the suppression of Defendant's post-Miranda statement to agents, asserting that the statement was involuntary and that Defendant's Miranda waiver was not knowingly and voluntarily given. Defendant fails to show that the post-arrest waiver was not knowingly, voluntarily, and intelligently made. Defendant's motion to suppress statements should be denied without an evidentiary hearing.

1. Post-Miranda Statements

After being placed under arrest, Defendant was questioned by Special Agents from U.S. Immigration and Customs Enforcement ("ICE"). Defendant was advised of his Miranda rights, which he acknowledged and waived, and then gave a statement. Defendant moves to suppress statements and requests that the government prove that all statements were voluntarily made, and made after a knowing and intelligent Miranda waiver. Defendant contends that 18 U.S.C. § 3501 mandates an evidentiary hearing be held to determine whether Defendant's statements were voluntary.

a. Knowing, Intelligent, and Voluntary Miranda Waiver

A statement made in response to custodial interrogation is admissible under Miranda v. Arizona, 384 U.S. 437 (1966), and 18 U.S.C. § 3501 if a preponderance of the evidence indicates that the statement was made after an advisement of Miranda rights, and was not elicited by improper coercion. See Colorado v. Connelly, 479 U.S. 157, 167-70 (1986) (preponderance of evidence standard governs voluntariness and Miranda determinations; valid waiver of Miranda rights should not be found in the "absence of police overreaching").

A valid Miranda waiver depends on the totality of the circumstances, including the background, experience, and conduct of the defendant. North Carolina v. Butler, 441 U.S. 369, 374-75 (1979). To be knowing and intelligent, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran v. Burbine, 475 U.S. 412, 421 (1986). The Government bears the burden of establishing the existence of a valid Miranda waiver. North Carolina v. Butler, 441 U.S. at 373. In assessing the validity of a defendant's Miranda waiver, this Courts should analyze the totality of the circumstances surrounding the interrogations. See Moran v. Burbine, 475 U.S. at 421. Factors commonly considered include: (1) the defendant's age (see United States v. Doe, 155 F.3d 1070, 1074-75 (9th Cir. 1998) (en banc) (valid waiver because the 17 year old defendant did not have trouble understanding questions, gave coherent answers, and did not ask officers to notify parents), (2) the defendant's familiarity with the criminal justice system (see United States v. Williams, 291 F.3d 1180, 1190 (9th Cir. 2002) (waiver valid in part because defendant was familiar with the criminal justice system from past encounters), (3) the explicitness of the Miranda waiver (see United States v. Bernard S., 795 F.2d 749, 753 n.4 (9th Cir. 1986) (a written Miranda waiver is "strong evidence that the waiver is valid"); United States v. Amano, 229 F.3d 801, 805 (9th Cir. 2000) (waiver valid where Miranda rights were read to defendant twice and defendant signed a written waiver), and (4) the time lapse between the reading of the Miranda warnings and the interrogation or confession. See Guam v. Dela Pena, 72 F.3d 767, 769-70 (9th Cir. 1995) (valid waiver despite 15-hour delay between Miranda warnings and interview). Furthermore, if there are multiple interrogations, as occurred in this case, repeat Miranda warnings are generally not required unless an "appreciable time" elapses between interrogations. See United States v. Nordling, 804 F.2d 1466, 1471 (9th Cir. 1986).

Here, the agents scrupulously honored the letter and spirit of Miranda in carefully advising Defendant of his Miranda rights prior to any post-arrest custodial interrogation. Defendant agreed to waive his Miranda rights prior to questioning. Based on the totality of the circumstances, Defendant's statements should not be suppressed because his Miranda waiver was knowing, intelligent, and voluntary.

b. Defendant's Statements Were Voluntary

The inquiry into the voluntariness of statements is the same as the inquiry into the voluntariness of a waiver of Miranda rights. See Derrick v. Peterson, 924 F.2d 813, 820 (9th Cir. 1990). Courts look to the totality of the circumstances to determine whether the statements were "the product of free and deliberate choice rather than coercion or improper inducement." United States v. Doe, 155 F.3d 1070, 1074(9th Cir. 1998)(en banc).

A confession is involuntary if "coerced either by physical intimidation or psychological pressure." United States v. Crawford, 372 F.3d 1048, 1060 (9th Cir. 2004) (quoting United States v. Haswood, 350 F.3d 1024, 1027 (9th Cir. 2003)). In determining whether a defendant's confession was voluntary, "the question is 'whether the defendant's will was overborne at the time he confessed.'" Clark v. Murphy, 331 F.3d 1062, 1072 (9th Cir.), cert. denied, 540 U.S. 968 (2003) (quoting Haynes v. Washington, 373 U.S. 503, 513 (1963)). Psychological coercion invokes no per se rule. United States v. Miller, 984 F.2d 1028, 1030 (9th Cir. 1993). Therefore, the Court must "consider the totality of the circumstances involved and their effect upon the will of the defendant." Id. at 1031 (citing Schneckloth v. Bustamonte, 412 U.S. 218, 226-27 (1973)).

In determining the issue of voluntariness, this Court should consider the five factors under 18 U.S.C. § 3501(b). United States v. Andaverde, 64 F.3d 1305, 1311 (9th Cir. 1995). These five factors include: (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he or she was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he or she was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his or her right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession. 18 U.S.C. § 3501(b). All five statutory factors under 18 U.S.C. § 3501(b) need not be met to find the statements were voluntarily made. See Andaverde, 64 F.3d at 1313.

As discussed above, Defendant was read his Miranda rights pre-interview. After Defendant acknowledged his Miranda rights, a dialogue ensued between the ICE agents and Defendant, whereupon Defendant decided to make a statement without having an attorney present. Defendant clearly understood his Miranda rights and agreed to waive those rights. See United States v. Gamez, 301 F.3d 1138, 1144 (9th Cir. 2002). Defendant's statements were not the product of physical intimidation or psychological pressure of any kind by any government agent. There is no evidence that Defendant's will was overborne at the time of his statements. Consequently, Defendant's motion to suppress his statements as involuntarily given should be denied.

2. There Is No Need for an Evidentiary Hearing

Under Ninth Circuit and Southern District precedent, as well as Southern District Local Criminal Rule 47.1(g)(1)-(4), a defendant is entitled to an evidentiary hearing on a motion to suppress only when the defendant adduces specific facts sufficient to require the granting of the defendant's motion. See United States v. Batiste, 868 F.2d 1089, 1093 (9th Cir. 1989); United States v. Moran-Garcia, 783 F. Supp. 1266, 1274 (S.D. Cal. 1991); Crim. L.R. 47.1. The local rule further provides that "the Court need not grant an evidentiary hearing where either party fails to properly support its motion for opposition."

No rights are infringed by the requirement of such a declaration. Requiring a declaration from a defendant in no way compromises Defendant's constitutional rights, as declarations in support of a motion to suppress cannot be used by the United States at trial over a defendant's objection. See Batiste, 868 F.2d at 1092 (proper to require declaration in support of Fourth Amendment motion to suppress); Moran-Garcia, 783 F. Supp. at 1271-74 (extending Batiste to Fifth Amendment motion to suppress). Moreover, Defendant has as much information as the United States in regards to the statements he made. See Batiste, 868 F.2d at 1092. At least in the context of motions to suppress statements, which require police misconduct suffered by Defendant while in custody, Defendant certainly should be able to provide the facts supporting the claim of misconduct.

Finally, any objection that 18 U.S.C. § 3501 requires an evidentiary hearing in every case is of no merit. Section 3501 requires only that the Court make a pretrial determination of voluntariness "out of the presence of the jury." Nothing in section 3501 betrays any intent by Congress to alter the longstanding rule vesting the form of proof on matters for the court in the discretion of the court. Batiste, 868 F.2d at 1092 ("Whether an evidentiary hearing is appropriate rests in the reasoned discretion of the district court.") (citation and quotation marks omitted).

The Ninth Circuit has expressly stated that a United States proffer based on the statement of facts attached to the complaint is alone adequate to defeat a motion to suppress where the defense fails to adduce specific and material facts. See Batiste, 868 F.2d at 1092. Moreover, the Ninth Circuit has held that a district court may properly deny a request for an evidentiary hearing on a motion to suppress evidence because the defendant did not properly submit a declaration pursuant to a local rule. See United States v. Wardlow, 951 F.2d 1115, 1116 (9th Cir. 1991); United States v. Howell, 231 F.3d 616, 620 (9th Cir. 2000) ("An evidentiary hearing on a motion to suppress need be held only when the moving papers allege facts with sufficient definiteness, clarity, and specificity to enable the trial court to conclude that contested issues of fact exist."); see also United States v. Walczak, 783 F. 2d 852, 857 (9th Cir. 1986) (holding that evidentiary hearings on a motion to suppress are required if the moving papers are sufficiently definite, specific, detailed, and nonconjectural to whether contested issues of fact exist). Even if Defendant provides factual allegations, the Court may still deny an evidentiary hearing if the grounds for suppression consist solely of conclusory allegations of illegality. See United States v. Wilson, 7 F.3d 828, 834-35 (9th Cir. 1993) (District Court Judge Gordon Thompson did not abuse his discretion in denying a request for an evidentiary hearing where the appellant's declaration and points and authorities submitted in support of motion to suppress indicated no contested issues of fact).

As Defendant in this case has failed to provide declarations alleging specific and material facts, the Court would be within its discretion to deny Defendant's motion based solely on the statement of facts attached to the complaint in this case, without any further showing by the United States. Defendant's allegation of a Miranda violation is based upon boilerplate language that fails to demonstrate there is a disputed factual issue requiring an evidentiary hearing. See Howell, 231 F.3d at 623.

As such, this Court should deny Defendant's motion to suppress and his request for an evidentiary hearing.

C. ADDITIONAL DISCOVERY REQUESTS

Defendant requests a litany of discovery from the 2002 case referenced above, including "all materials pertaining to the lie detector test conducted by the FBI" in the case. The assigned Assistant U.S. Attorney has made an inquiry as to whether any such materials exist, above and beyond two Reports of Investigation that detail the facts of the case and the subsequent polygraph examination.

The United States will provide such materials, to the extent further such materials exist, and constitute either: (1) any statements subject to discovery under Fed. R. Crim. P. 16(a)(1)(A) (substance of Defendant's oral statements *in response to government interrogation*) and 16(a)(1)(B) (Defendant's relevant written or recorded statements, written records containing substance of Defendant's oral statements *in response to government interrogation*, and Defendant's grand jury testimony); or (2) exculpatory evidence within its possession that is material to the issue of guilt or punishment.

However, as noted in the government's Response to Defendant's original Motion to Compel Discovery, arrest reports, investigator's notes, memos from arresting officers, and prosecution reports pertaining to Defendant are discoverable only to the extent that they include

Brady material or the statements of Defendant. Otherwise, they are protected from discovery by Fed. R. Crim. P. 16(a)(2) as "reports . . . made by . . . Government agents in connection with the investigation or prosecution of the case."

Additionally, Defendant cannot establish that polygraph evidence is reliable. As the Supreme Court has explained, "there is simply no consensus that polygraph evidence is reliable. To this day, the scientific community remains extremely polarized about the reliability of polygraph techniques." United States v. Scheffer, 523 U.S. 303, 309 (1998). While the Ninth Circuit has held that district courts may admit polygraph evidence under certain limited circumstances, it has made it clear that unstipulated polygraph evidence concerning a defendant's mental state is inadmissible under Fed. R. Evid. 704(b) when it involves the "ultimate issue" of mens rea. United States v. Campos, 217 F.3d 707, 711-12 (9th Cir. 2000).

It is unclear for what purpose Defendant would seek the introduction of such polygraph evidence. Although Defendant has yet to provide notice of a duress defense, it appears from his most recent filing that he may raise such a defense at trial, and seek to admit polygraph results as evidence of duress to rebut mens rea. This is completely improper. As Fed. R. Evid. 704(b) makes abundantly clear:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did not have the mental state or condition constituting an element of the crime charged *or of a defense thereto*. Such ultimate issues are matters for the trier of fact alone.

(Emphasis added.)

Finally, as this case does not have a trial date, the United States has yet to make a decision as to whether it will seek admission of evidence from the 2002 smuggling incident in its case-in-chief pursuant to Fed. R. Evid. 404(b). Defendant's motion is thus premature. Furthermore, assuming sufficient notice is provided in the event the government seeks to admit such evidence, the materials already provided would likely be sufficient to meet the government's discovery obligations, as Rule 404(b) only requires that the Government provide reasonable notice of the *general nature* of any prior acts by a defendant it intends to offer at trial.

To the extent Defendant may raise a duress defense, *he* obviously cannot elicit evidence his 2002 statements, as such would be rank hearsay because it would not be introduced by a party-opponent. See Fed. R. Evid. 801. Even if the government were to impeach any duress-related trial testimony with evidence from the 2002 incident, the government need not provide discovery of potential impeachment evidence. United States v. Gonzalez-Ricon, 36 F.3d 859, 864-65 (9th Cir. 1994) ("The Government is not obligated by Rule 16(a) to anticipate every possible defense, assume what the defendant's trial testimony . . . will be, and then furnish him with otherwise irrelevant materials that might conflict with his testimony."); United States v. Audelo-Sanchez, 923 F.2d 129, 130 (9th Cir. 1990). The disclosure requirements in Rule 404(b) were not meant to change these discovery rules. "The Committee does not intend the amendment will supercede other rules of admissibility of disclosure . . . ." Advisory Committee Notes to the 1991 Amendment to Rule 404(b). Defendant's arguments are meritless.

The United States otherwise submits on its Response to Defendant's previous Motion to Compel Discovery, previously filed under separate cover.

IV

CONCLUSION

For the foregoing reasons, the government respectfully requests that Defendant's motions, except where not opposed, be denied.

DATED: March 25, 2008.

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ William A. Hall, Jr.
WILLIAM A. HALL, JR.
Assistant United States Attorney